

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

5 GARY GENE WATTS,) 3:04-CV-0386-ECR (RAM)
6 Petitioner,)
7)
8 vs.) **Order**
9 CRAIG FARWELL, et al.,)
10 Respondents.)

I. Introduction and Background

13 This is a petition for a writ of habeas corpus pursuant to 28
14 U.S.C. § 2254, by Gary Gene Watts, a prisoner at Lovelock
15 Correctional Center.

Petitioner was convicted in Nevada's Third Judicial District Court in 1998 of three counts of sexual assault of a minor under the age of fourteen years, and was sentenced to three consecutive terms of life imprisonment with the possibility of parole after ten years. Petitioner pled guilty to two of the charges and entered an Alford plea as to the third count.

Petitioner filed a pro se appeal, for which Attorney John P. Springgate entered an appearance to represent Petitioner in the prosecution of his appeal. Petitioner sought to challenge his plea canvass, alleging that the sentences were to run concurrently, not consecutively. The Nevada Supreme Court dismissed the appeal on May 10, 2000, because the Court does not allow a defendant to challenge

1 the validity of a guilty plea on direct appeal. Order Dismissing
2 Appeal, No. 32978 at 1-2 (May 10, 2000) (Ex. 36).

3 On May 9, 2001, Petitioner filed a post-conviction Petition for
4 Writ of Habeas Corpus, raising five assignments of error:

5 (1) Petitioner's guilty/Alford plea was not knowingly,
6 voluntarily or intelligently entered because the court failed
7 to discuss or explain to Petitioner the possibility and effect
of consecutive sentences during the plea canvass;

8 (2) Ineffective assistance of trial counsel, Attorney Witek,
9 because counsel failed to have a psychological evaluation
performed regarding Petitioner's competency and failed to
adequately advise Petitioner regarding the consequences of his
plea;

10 (3) Ineffective assistance of trial counsel, Attorney Witek,
11 because counsel failed to advise Petitioner and Court of a
12 conflict of interest: Witek also represented one of the three
female victims on other charges during his representation of
Petitioner;

13 (4) Ineffective assistance of trial counsel, Attorneys Witek,
14 Ward, and Grant, for failure to investigate the case; and

15 (5) Ineffective assistance of appellate counsel for raising
16 only the sentencing claim, and neglecting the conflict of
interest claim, on direct appeal.

17 On December 21, 2001, Petitioner's attorney filed a Brief in
18 Support of Petition for Writ of Habeas Corpus, providing additional
19 argument concerning (1) the failure to investigate the criminal
20 charges, (2) whether Defendant's plea was not knowing and
21 intelligent due to counsel's failure to investigate, (3) counsel's
22 conflict of interest, and (4) whether based on the totality of the
23 circumstances, Petitioner's guilty plea should be set aside because
24 the plea was not knowingly and voluntarily made. On January 10,
25 2003, Petitioner's attorney filed a Supplemental Petition for Post-
26 Conviction Relief to discuss trial counsel's purported conflict of
27 interest due to his employment at the Lyon County District

1 Attorney's office at the commencement of Petitioner's criminal
2 charges, to which the State responded.

3 After an evidentiary hearing, the state district court denied
4 the petition. Petitioner appealed this decision. The Nevada
5 Supreme Court "received/entered" Petitioner's proper person
6 Appellant's Opening Brief on October 16, 2003, which raised the
7 following assignments of error:

8 I. The District Court erred by determining that Counsel Witek's
9 representation was effective under Strickland

10 A. Witek's failure to investigate was ineffective and
Appellant was prejudiced thereby

11 B. Counsel's two conflicts of interest was ineffective and
Appellant was prejudiced thereby

12 II. The District Court erred by determining that Appellant's
13 guilty plea was voluntarily and knowingly entered

14 III. The District Court failed to render findings of fact and
conclusions of law as to several claims presented in the
15 proceedings below which merit habeas relief

16 A. A Brady violation occurred

17 B. Appellate counsel was ineffective

18 C. Appellant's question of competency was never addressed

19 Petitioner was allowed to file a supplemental memorandum
20 addressing counsel's two purported conflicts of interest. The
21 Nevada Supreme Court affirmed the district court.

22 Petitioner filed his Petition for Writ of Habeas Corpus (#7) in
23 this Court on September 21, 2004. The present petition,

24 Petitioner's First Amended Petition (#17), was filed on May 6, 2005.

25 The First Amended Petition raises the following grounds for relief:

26 Ground One: Violation of due process of law under the Fifth and
27 Fourteenth Amendments to the United States Constitution because
his guilty plea was not entered knowingly, intelligently, and

1 voluntarily due to the trial court's failure to advise
2 Petitioner of the possibility of consecutive sentences.

3 Ground Two: Ineffective assistance of trial counsel as
4 guaranteed by the Sixth and Fourteenth Amendments to the United
5 States Constitution as a result of counsel's failure to (A)
6 investigate the case, (B) advise Petitioner as to the
7 consequences of his plea, (C) obtain a psychological
8 examination, and (D) advise Petitioner or the Court of the
9 conflicts of interest.

10 Respondents answered (#27) and moved to dismiss the petition
11 (#28). This Court found that Ground 2(B) – failure to advise
12 Petitioner as to the consequence of his plea – was not exhausted.
13 (Order #37.) Pursuant to this Court's Order (#37), Defendant
14 elected to abandon Ground 2(B). The remaining issues are properly
15 before the Court.

16 **II. Federal Habeas Standard**

17 Title 28 of United States Code § 2254(d), a provision of the
18 Antiterrorism and Effective Death Penalty Act (AEDPA), provides the
19 legal standards for this Court's consideration of the petition in
20 this case:

21 An application for a writ of habeas corpus on behalf
22 of a person in custody pursuant to the judgment of a State
23 court shall not be granted with respect to any claim that
24 was adjudicated on the merits in State court proceedings
25 unless the adjudication of the claim --

26 (1) resulted in a decision that was contrary to, or
27 involved an unreasonable application of, clearly
28 established Federal law, as determined by the Supreme
Court of the United States; or

29 (2) resulted in a decision that was based on an
30 unreasonable determination of the facts in light of the
31 evidence presented in the State court proceeding.

32 28 U.S.C. § 2254(d).

1 These standards of review "reflect the ... general requirement
 2 that federal courts not disturb state court determinations unless
 3 the state court has failed to follow the law as explicated by the
 4 Supreme Court." Davis v. Kramer, 167 F.3d 494, 500 (9th Cir. 1999).

5 A state court decision is contrary to clearly established
 6 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if
 7 the state court applies a rule that contradicts the governing law
 8 set forth in [the Supreme Court's] cases" or "if the state court
 9 confronts a set of facts that are materially indistinguishable from
 10 a decision of [the Supreme Court] and nevertheless arrives at a
 11 result different from [the Supreme Court's] precedent." Lockyer v.
Andrade, 123 S.Ct. 1166, 1173 (2003) (quoting Williams v. Taylor,
 13 529 U.S. 362, 405-06 (2000), and citing Bell v. Cone, 535 U.S. 685,
 14 694 (2002)).

15 A state court decision is an unreasonable application of
 16 clearly established Supreme Court precedent, within the meaning of
 17 28 U.S.C. § 2254(d), "if the state court identifies the correct
 18 governing legal principle from [the Supreme Court's] decisions but
 19 unreasonably applies that principle to the facts of the prisoner's
 20 case." Lockyer v. Andrade, 123 S.Ct. at 1174 (quoting Williams, 529
 21 U.S. at 413). The "unreasonable application" clause requires the
 22 state court decision to be more than incorrect or erroneous; the
 23 state court's application of clearly established law must be
 24 objectively unreasonable. Id. (quoting Williams, 529 U.S. at 409).

25 In determining whether a state court decision is contrary to
 26 federal law, this Court looks to the state courts' last reasoned
 27 decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991);

1 Shackelford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000),
 2 cert. denied, 122 S.Ct. 324 (2001).

3 With respect to pure questions of fact, "a determination of a
 4 factual issue made by a State court shall be presumed to be
 5 correct," and the petitioner "shall have the burden of rebutting the
 6 presumption of correctness by clear and convincing evidence." 28
 7 U.S.C. § 2254(e)(1).

8

9 **III. Consideration of Exhibit 57**

10 In its Order (#37), this Court reserved judgment on the
 11 question of whether Exhibit 57, an affidavit meant to support the
 12 amended petition, should be considered in ruling on Petitioner's
 13 federal habeas claims. (Order 2:21-22 (#37).) Exhibit 57 is an
 14 affidavit from Ed Hddy, an investigator with the Federal Public
 15 Defenders Office. Hddy claims to have spoken to two of the victims
 16 and that they acknowledge they were "active participants" in the
 17 charged sexual acts. (Ex. 57 at 2.) Attached to the affidavit are
 18 two statements, purportedly belonging to the two victims, where both
 19 victims state they would have testified that Petitioner should have
 20 received a lighter sentence. Petitioner suggests that in light of
 21 this, he should have been sentenced to a sentence concomitant with
 22 statutory seduction, one to ten years, instead of sexual assault,
 23 which at the time of the crime carried a life sentence with a
 24 possibility of parole after ten years. Petitioner was 42 at the
 25 time of the sexual assaults; the victims were 13.

26 Respondent argues that considering the attachment of new
 27 evidence violates 28 U.S.C. § 2254 because the Court would be

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1 examining a different record than that which was before the state
 2 courts. Petitioner responds that the affidavit "merely provides
 3 evidence that the facts as alleged by Watts were, in fact, true."
 4 (Petit.'s Opp. 9 (#32).) Petitioner seeks to use the evidence to
 5 support his claim that trial "counsel was ineffective for failing to
 6 investigate, locate and interview the victims." (Id.)

7 We do not find Petitioner's reasoning persuasive. Petitioner
 8 is attempting to inject the affidavit into the proceedings
 9 specifically to continue to develop the factual record. Section
 10 2254(e)(2) permits this additional information in only limited
 11 instances, none of which are present here. There is no "new rule of
 12 constitutional law made retroactive to cases on collateral review by
 13 the Supreme Court" that was previously unavailable. See §
 14 2254(e)(2)(A)(i). Nor is there "a factual predicate that could not
 15 have been previously discovered through the exercise of due
 16 diligence." See § 2254(e)(2)(A)(ii). Finally, there is nothing
 17 underlying the claim that "would be sufficient to establish by clear
 18 and convincing evidence that but for constitutional error, no
 19 reasonable fact-finder would have found the applicant guilty of the
 20 underlying offense." See § 2254(e)(2)(B).

21 Therefore, we will not consider Exhibit 57.

IV. Ground One: Consecutive and Concurrent Sentences Claim

22 Petitioner avers that his conviction and sentence are
 23 unconstitutional because his guilty plea was not knowingly,
 24 intelligently, and voluntarily given in violation of his Fifth and
 25 Fourteenth Amendment rights because the trial court failed to advise
 26

1 him that the sentences could run consecutively. Specifically,
 2 Petitioner argues that the "trial court did not specifically advise
 3 him that the sentences could run consecutively or that it was solely
 4 within the court's discretion to impose the sentences consecutively
 5 or concurrently." (Petit.'s Reply 5 (#42).)

6 Respondents argue that "the record reflects that Watts was in
 7 fact aware that the sentences could be imposed consecutively."
 8 (Resps.' Answer 10 (#40).)

9 **A. Standard for Withdrawal of Plea Deal**

10 A guilty plea waives important rights and is valid only if done
 11 voluntarily, knowingly, and intelligently, "with sufficient
 12 awareness of the relevant circumstances and likely consequences."

13 Brady v. United States, 397 U.S. 742, 748 (1970). The court taking
 14 a defendant's plea is "responsible for ensuring a 'record adequate
 15 for any review that may be later sought.'" Bradshaw v. Stumpf, 545
 16 U.S. 175, 183 (2005) (quoting Boykin v. Alabama, 395 U.S. 238, 244
 17 (1969)). The Supreme Court has "never held that the judge must
 18 himself explain the elements of each charge to the defendant on the
 19 record." Id. Instead, the "constitutional prerequisites of a valid
 20 plea may be satisfied where the record accurately reflects that the
 21 nature of the charge and the elements of the crime were explained to
 22 the defendant by his own, competent counsel." Id. Nevertheless, a
 23 plea of guilty must include the awareness of the "direct
 24 consequences" of the plea. Brady, 397 U.S. at 755 (quoting Shelton
 25 v. United States, 242 F.2d 101, 115 (5th Cir. 1957) (judgment rev'd
 26 on other grounds by Shelton v. United States, 356 U.S. 26 (1958)).

27 //

1 **B. Analysis**

2 Petitioner contends that the Nevada Supreme Court did not rely
 3 on any Supreme Court of the United States precedent in making its
 4 decision. Even though this is true, such a failure does not require
 5 the writ to issue. In considering this claim, the Nevada Supreme
 6 Court found that "the guilty plea agreement, signed by Watts,
 7 provided that 'if more than one sentence of imprisonment is imposed
 8 the sentencing judge has the discretion to order the sentences
 9 served concurrently or consecutively.'" Order of Affirmance, No.
 10 41762 at 2-3 (May 28, 2004). The Court continued, "during the oral
 11 plea canvass, Watts acknowledged that he signed and discussed the
 12 terms of the plea agreement with his attorney." Id. at 3. The
 13 Court noted that the district court did not explicitly advise
 14 Petitioner that his sentences could be imposed consecutively during
 15 the canvass, but concluded that "the failure to utter talismanic
 16 phrases will not invalidate a plea where a totality of circumstances
 17 demonstrates that the plea was freely, knowingly, and voluntarily
 18 made." Id. (quoting State v. Freese, 13 P.3d 442, 447 (Nev.
 19 2000)).

20 The trial court below sufficiently ensured an adequate record
 21 for review, and this record reveals that Petitioner knew that his
 22 sentences could be imposed either consecutively or concurrently.
 23 Thus, the constitutional prerequisites for entering into a plea deal
 24 were met in accordance with the Supreme Court in Bradshaw. First,
 25 as the Nevada Supreme Court found, Petitioner himself signed the
 26 guilty plea agreement, which provided for the possibility that the
 27 sentencing judge could impose consecutive sentences. Second, as the
 28

1 Nevada Supreme Court found, Petitioner acknowledged that he
 2 discussed the terms of the plea agreement with his attorney. Third,
 3 the guilty plea agreement provided that the district attorney could
 4 argue for the imposition of consecutive sentences. Guilty Plea
Agreement at 1 (Exhibit 19). Fourth, Petitioner acknowledged that
 5 he understood the consequences of his plea in the guilty plea
 6 agreement. Id. at 2 ("Consequences of the Plea" section). Fifth,
 7 Petitioner did not object when the prosecutor asked for consecutive
 8 sentences, (Sentencing Proceedings, July 20, 1998 at 7-14 (Exhibit
 9 23)), nor did Petitioner object when his own attorney asked the
 10 court to run one of the three counts concurrently rather than
 11 consecutively, thereby arguing for a twenty-year term instead of a
 12 thirty-year term. (Id. at 10.) Sixth, Petitioner did not object or
 13 make any indication that he did not understand what was happening
 14 when the court imposed consecutive sentences. (Id. at 12-14.)

15
 16 We cannot say that the Nevada Supreme Court's conclusion, in
 17 light of the precedent of the Supreme Court of the United States,
 18 was objectively unreasonable.

19

20 **V. Ground Two: Ineffective Assistance of Counsel**

21 Petitioner claims he received ineffective assistance of counsel
 22 in three ways: (1) counsel failed to investigate the case; (2)
 23 counsel failed to seek a competency evaluation; and (3) counsel had
 24 two conflicts of interest.

25 **A. Standard for Ineffective Assistance of Counsel**

26 In McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), the
 27 Supreme Court declared that "the right to counsel is the right to

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1 the effective assistance of counsel." In Strickland v. Washington,
 2 466 U.S. 668 (1984), the Court established the standards by which
 3 claims of ineffective counsel are to be measured. In Strickland,
 4 the Court propounded a two prong test; a petitioner claiming
 5 ineffective assistance of counsel must demonstrate (1) that the
 6 defense attorney's representation "fell below an objective standard
 7 of reasonableness," and (2) that the attorney's deficient
 8 performance prejudiced the defendant such that "there is a
 9 reasonable probability that, but for counsel's unprofessional
 10 errors, the result of the proceeding would have been different."
 11 Strickland, 466 U.S. at 688, 694.

12 Regarding the first prong – commonly known as the
 13 "effectiveness prong" – the Strickland Court expressly declined to
 14 articulate specific guidelines for attorney performance beyond
 15 generalized duties, including the duty of loyalty, the duty to avoid
 16 conflicts of interest, the duty to advocate the defendant's cause,
 17 and the duty to communicate with the client over the course of the
 18 prosecution. Id. Defense counsel's duties are not to be defined so
 19 exhaustively as to give rise to a "checklist for judicial evaluation
 20 ... [because] [a]ny such set of rules would interfere with the
 21 constitutionally protected independence of counsel and restrict the
 22 wide latitude counsel must have in making tactical decisions." Id.

23 The Strickland Court instructed that review of an attorney's
 24 performance must be "highly deferential," and must adopt counsel's
 25 perspective at the time of the challenged conduct, in order to avoid
 26 the "distorting effects of hindsight." Id. at 689. A reviewing
 27 court must "indulge a strong presumption that counsel's conduct

1 falls within the wide range of reasonable professional assistance
 2 ... [and] the [petitioner] must overcome the presumption that ...
 3 the challenged action might be considered sound trial strategy."
 4 Id. (citation omitted).

5 Construing the Sixth Amendment to guarantee not effective
 6 counsel per se, but rather a fair proceeding with a reliable
 7 outcome, the Strickland Court concluded that demonstrating that
 8 counsel fell below an objective standard of reasonableness alone is
 9 insufficient to warrant a finding of ineffective assistance. In
 10 order to satisfy Strickland's second prong, the defendant must show
 11 that the attorney's sub-par performance prejudiced the defense. Id.
 12 at 691-92. The test is whether there is a reasonable probability
 13 that, but for the attorney's challenged conduct, the result of the
 14 proceeding in question would have been different. Id. at 691-94.
 15 The Court defined reasonable probability as "a probability
 16 sufficient to undermine confidence in the outcome." Id. at 694.

17 **B. Ground Two A: Failure to Investigate the Case**

18 Petitioner contends that trial counsel failed to conduct any
 19 interviews or perform any investigation of the underlying case.
 20 Petitioner argues that his decision to plead guilty was predicated
 21 on a Sixth Amendment violation – to wit, that trial counsel
 22 "abdicated his Sixth Amendment responsibility to zealously represent
 23 his client." (Petit.'s Reply 7 (#42).) Petitioner contends that
 24 had trial counsel investigated the case, counsel would have been
 25 able to develop the fact that the sexual acts were consensual.
 26 Petitioner asserts that the prosecution could then only have proven
 27
 28

1 statutory sexual seduction, the penalties for which are
 2 significantly lower than those for sexual assault.

3 The Nevada Supreme Court rejected Petitioner's claims. The
 4 Court wrote:¹

5 To state a claim of ineffective assistance of trial
 6 counsel sufficient to invalidate a judgment of conviction,
 7 a petitioner must demonstrate that counsel's performance
 8 fell below an objective standard of reasonableness. See
Strickland v. Washington, 466 U.S. 668, (1984); Warden v.
Lyons, 100 Nev. 430, 683 P.2d 504 (1984). A petitioner
 9 must further establish "a reasonable probability that, but
 10 for counsel's errors, he would not have pleaded guilty and
 11 would have insisted on going to trial." Hill v. Lockhart,
474 U.S. 52, 59 (1985); see also Kirksey v. State, 112
Nev. 980, 988, 923 P.2d 1102, 1107 (1996). The court can
 12 dispose of a claim if the petitioner makes an insufficient
 13 showing on either prong. Strickland, 466 U.S. at 697.
 14 The district court's factual findings regarding a claim of
 15 ineffective assistance of counsel are entitled to
 16 deference when reviewed on appeal. Riley v. State, 110
Nev. 638, 647, 878 P.2d 272, 278 (1994).

17 Third, Watts alleged that his trial counsel was
 18 ineffective for failing to investigate the victims. Watts
 19 claimed that with a proper investigation, he would not
 20 have pleaded guilty. Watts contended that a thorough
 21 investigation would have produced impeachment evidence,
 22 allowed counsel to attack the credibility of the victims,
 23 revealed the victim's motive to fabricate, and uncovered
 24 whether the victims were competent to stand trial. Watts
 25 did not support this claim with specific facts, however,
 26 and his claim is nothing more than speculation concerning
 27 evidence that may have been uncovered by additional
 28 investigation. See Hargrove v. State, 100 Nev. 498, 502,
 686 P.2d 222, 225 (1984). Thus, Watts did not demonstrate
 29 that his trial counsel was ineffective on this issue, and
 30 we affirm the order of the district court with respect to
 31 this claim. Fourth, Watts claimed that his trial counsel
 32 was ineffective for failing to adequately investigate and
 33 inform Watts of the defense of consent. Watts contended
 34 that he would not have pleaded guilty to three counts of
 35 sexual assault on a minor under the age of fourteen if he
 36 was aware that consent was a defense. Watts further
 37 claimed that his counsel was ineffective in allowing him
 38

26 ¹The Nevada Supreme Court places citations in footnotes. For
 27 ease of formatting, the citations are embedded in the textual
 28 sentences throughout this Order.

1 to plead guilty to sexual assault rather than statutory
2 sexual seduction.

3 Witek testified at the evidentiary hearing that he
4 did not believe consent was a viable defense based on the
5 facts of Watts' case. Witek further testified that the
6 State was unwilling to accept a plea to statutory sexual
7 seduction rather than sexual assault. The record on
8 appeal reveals that forty-two-year-old Watts allowed two
9 runaway thirteen year-old girls to stay at his home.
10 Additionally, a thirteen year-old neighbor frequently
11 spent the night at Watts' residence. Watts provided the
12 girls with marijuana and methamphetamine. He also showed
13 them a pornographic video. When the girls were under the
14 influence of drugs, Watts engaged in sexual activity with
15 them. We conclude that Watts failed to establish that his
16 trial counsel acted unreasonably on this issue. Watts did
17 not demonstrate that the victims were mentally and
18 physically capable of consenting to sexual activity with
19 him, such that his trial counsel was ineffective in
20 allowing him to plead guilty to sexual assault. See NRS
21 200.366 (providing that a person is guilty of sexual
22 assault if he "subjects another person to sexual
23 penetration . . . against the will of the victim or under
24 conditions in which the perpetrator knows or should know
25 that the victim is mentally or physically incapable of
resisting or understanding the nature of his conduct").
Consequently, the district court did not err in denying
the claim.

Order of Affirmance, No. 41762 at 3-7 (May 28, 2004).

We find that the Nevada Supreme Court's decision was a reasonable application of clearly established United States Supreme Court precedent. The Nevada Supreme Court identified the correct governing legal principles from the Supreme Court of the United States and reasonably applied those principles to the facts at hand.

C. Ground Two B: Failure to Advise Petitioner as to the Consequences of His Plea

Petitioner has voluntarily abandoned this claim. (Petit.'s Formal Decl. of Abandonment (#38).)

D. Ground Two C: Failure To Obtain a Psychological Examination

While awaiting extradition from Guam, Petitioner attempted suicide. He avers that his suicidal ideation remained through

1 entering his plea agreement. (Petit.'s Reply 7 (#42).) Trial
 2 counsel advised Petitioner that he could undergo a psychological
 3 evaluation; however, none was ever taken. (Id.) Petitioner now
 4 contends that trial counsel was ineffective because by not insisting
 5 on an evaluation, counsel could not be sure that Petitioner was
 6 entering a knowing, voluntary, and intelligent plea. (Id.)

7 **1. Supreme Court of the United States Standard**

8 To stand trial, the Supreme Court requires a defendant to have
 9 "sufficient present ability to consult with his lawyer with a
 10 reasonable degree of rational understanding – and [have] a rational
 11 as well as factual understanding of the proceedings against him."
 12 Drope v. Missouri, 420 U.S. 162, 172 (1975) (internal quotation
 13 omitted). In Godinez v. Moran, 509 U.S. 389 (1993), the Court
 14 determined that the standard for competence when pleading guilty was
 15 the same as the standard for standing trial. Id. at 398. In Drope,
 16 the Supreme Court looked to state law to determine the standard for
 17 when a person was competent to stand trial. See Drope, 420 U.S. at
 18 173–74.

19 **2. Nevada Supreme Court's Findings**

20 In Petitioner's case, the Nevada Supreme Court found the
 21 following:

22 A defendant is competent to stand trial if he has
 23 adequate "present ability to consult with his lawyer with
 24 a reasonable degree of rational understanding" and if "he
 25 has a rational as well as a factual understanding of the
 26 proceedings against him." Melchor-Gloria v. State, 99
 27 Nev. 174, 179-80, 660 P.2d 109, 113 (1983). A hearing is
 28 constitutionally and statutorily required if reasonable
 doubt exists as to the defendant's competency. See id. at
 180, 660 P.2d at 113; NRS 178.400-440. In the instant
 case, Watts did not allege specific facts to support a
 conclusion he was unable to consult with his attorney, or

1 understand the proceedings against him. Rather, Watts
 2 claimed that he was despondent when faced with extradition
 3 to stand trial on multiple sexual assault charges.
 4 Further, Witek testified at the evidentiary hearing that
 5 he met with Watts three or four times prior to the entry
 6 of his guilty plea, and Witek felt that Watts "was not
 7 even approaching incompetency." Finally, Watts testified
 8 that he never informed Witek of his suicide attempt in
 9 Guam. Consequently, we conclude that Watts did not
 10 demonstrate that his counsel acted unreasonably in failing
 11 to have his competency evaluated, and the district court
 12 did not err in denying the claim.

13 Order of Affirmance, No. 41762 at 4-5 (May 28, 2004).

14 **3. Analysis**

15 Here, Petitioner claims that trial counsel was ineffective
 16 because he did not order Petitioner to undergo a psychological
 17 evaluation to ensure that he was competent to enter into a plea
 18 deal. Thus, Petitioner must show that trial counsel was (1)
 19 objectively unreasonable and (2) prejudicial to Petitioner in regard
 20 to whether Petitioner was sufficiently able to consult with trial
 21 counsel.

22 No Supreme Court case requires an attorney to request a
 23 psychological evaluation of a client who has attempted suicide.
 24 Moreover, as the Nevada Supreme Court found, Petitioner never
 25 informed counsel that he had attempted suicide, nor is there any
 26 evidence that suggests that counsel should have known of any
 27 suicidal ideation. For Petitioner's claim to succeed, not only
 28 would trial counsel have had to be aware of the suicide attempt and
 somehow forced Petitioner to undergo the evaluation, but Petitioner
 would have had to have been found incompetent, otherwise there would
 be no prejudice.

1 We find that the Nevada Supreme Court reasonably applied the
2 correct legal standard to the facts in this case.

E. Ground Two D: Failure to Advise Petitioner or the Court of the Conflicts of Interest

Petitioner asserts that trial counsel had two conflicts of interest: (1) a conflict due to his representation of one of the victims during the pendency of Petitioner's criminal action; and (2) a conflict due to his employment at the Lyons County District Attorneys office at the initiation of criminal charges against Petitioner.

1. Supreme Court of the United States Standard for Conflicts of Interest

12 In Mickens v. Taylor, 535 U.S. 162 (2002), the Supreme Court of
13 the United States concluded that it is a violation of a defendant's
14 Sixth Amendment right to effective assistance of counsel to actively
15 represent conflicting interests. Id. at 166. For example, the
16 Court in Holloway v. Arkansas, 435 U.S. 475 (1978), found such
17 active representation of conflicting interests occurred when a trial
18 court, over objection, required defense counsel to represent
19 simultaneously three co-defendants. Id. at 478-80. The trial court
20 would not allow counsel to cross-examine any of the defendants on
21 the behalf of the other two. Id. On appeal, the Supreme Court
22 acknowledged that a defense attorney is in the best position "to
23 determine when a conflict of interest exists or will probably
24 develop in the course of a trial." Id. at 485 (internal quotation
25 omitted).

26 The Supreme Court clarified this position in Cuyler v.
27 Sullivan, 446 U.S. 335 (1980), where the court held that a defendant

1 must demonstrate that a "conflict of interest actually affected the
 2 adequacy of his representation." *Id.* at 348-49. Sullivan also
 3 recognized that a trial court may have a duty to inquire into a
 4 conflict of interest. *Id.* at 346-47.

5 Returning to Mickens, the Supreme Court held that unless
 6 counsel protests his "inability simultaneously to represent multiple
 7 defendants" or the court is required to inquire into a conflict, a
 8 petitioner must establish "that the conflict of interest adversely
 9 affected his counsel's performance." *Mickens*, 535 U.S. at 173-74.
 10 Thus, the standard to apply is that from Sullivan.

11 **2. Petitioner's Actual Conflict Claim**

12 With respect to Petitioner's claim that counsel was ineffective
 13 because counsel previously represented one of the victims, the
 14 Nevada Supreme Court found the following:

15 Witek testified that he was asked to represent C.H., one
 16 of Watts' victims, in an unrelated juvenile hearing
 17 approximately two weeks before he was assigned to
 18 represent Watts. Witek stated that he met with C.H. for
 19 no more than ten or twelve minutes and appeared briefly
 20 with her in juvenile court. Witek further testified that
 21 he made no connection between his representation of C.H.
 and Watts' case until the instant petition was filed. We
 conclude that Watts failed to establish that an actual
 conflict of interest existed due to his trial counsel's
 prior representation of C.H., such that Watts was denied
 the effective assistance of counsel. Therefore, the
 district court did not err in denying the claim.

22 *Order of Affirmance*, No. 41762 at 8-9 (May 28, 2004).

23 The Nevada Supreme Court examined the proper standard and
 24 reasonably applied the facts. Counsel was unaware of any potential
 25 conflict of interest, and Petitioner has not shown that any conflict
 26 actually affected the adequacy of the representation. We also note
 27 that in his failure to investigate claim above, Petitioner assigned
 28

1 error to trial counsel for not meeting with C.H.; Petitioner cannot
 2 now attempt to argue that by meeting a victim trial counsel's
 3 representation was "influenced" and caused him to "advise Watts to
 4 enter a plea."

5 **3. Petitioner's Conflict of Interest - Former Employer**
Claim

6 Petitioner claims that attorney Witek had a conflict of
 7 interest in representing Petitioner because Witek previously worked
 8 for the Lyons County District Attorney's office. Petitioner avers
 9 that Witek did not tell him of Witek's previous employment, and that
 10 if Petitioner had known of it, Petitioner would not have allowed
 11 Witek to remain as his counsel.

12 With respect to this claim, the Nevada Supreme Court concluded
 13 as follows:

14 "The Sixth Amendment guarantees a criminal defendant
 15 the right to conflict-free representation." Coleman v.
State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); see also
Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992). In
 16 order to establish a violation of this right, a defendant
 17 must demonstrate that "an actual conflict of interest
 18 adversely affected his lawyer's performance." Cuyler v.
Sullivan, 446 U.S. 335, 350 (1980); see also Clark, 108
 19 Nev. 324, 831 P.2d 1374. The existence of an actual
 20 conflict of interest must be established on the specific
 21 facts of each case, but "[i]n general, a conflict exists
 22 when an attorney is placed in a situation conducive to
 23 divided loyalties." Clark, 108 Nev. at 326, 831 P.2d at
 24 1376 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th
 25 Cir. 1991)).

26 In the instant case, Witek testified he was not
 27 involved in Watts' case while he worked at the district
 attorney's office. Witek further stated that his
 familiarity with Watts' case consisted of nothing more
 than a general knowledge that an individual charged with
 sex offenses had fled the jurisdiction. Witek did not
 recognize Watts as this individual, however, when Watts
 was extradited to Nevada more than two years later and
 Witek was assigned to represent him. Based on the above
 testimony, the district court's determination that Witek
 did not actively represent conflicting interests is

1 supported by substantial evidence. See Riley, 110 Nev. at
2 647, 878 P.2d at 278. Consequently, we affirm the order
of the district court with respect to this claim.

3 Order of Affirmance, No. 41762 at 7-8 (May 28, 2004).

4 The Nevada Supreme Court reasonably applied the facts at hand
5 to the appropriate legal standard, as set forth by the Supreme Court
6 of the United States.

7

8 **VI. Conclusion**

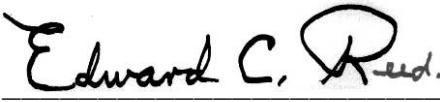
9 **IT IS THEREFORE HEREBY ORDERED THAT** Petitioner's request for
10 the Court to include Exhibit 57 in the record is **DENIED**.

11 **IT IS FURTHER ORDERED THAT** the first amended petition for writ
12 of habeas corpus (#17) is **DENIED**.

13 The clerk shall enter judgment accordingly.

14

15 DATED: March 27, 2008.

16 
17 UNITED STATES DISTRICT JUDGE

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